Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1691

PAUL I. GUEST, et al., Appellants

v.

F. EMMETT FITZPATRICK, et al.

No. 75-1698

THE WILLIAMSPORT HOSPITAL, et al., Appellants

v.

F. EMMETT FITZPATRICK, et al.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

ANSWER TO MOTIONS TO DISMISS No. 75-1691 BASED UPON MOOTNESS AND TO AFFIRM No. 75-1698 BASED UPON INTERVENING CIRCUMSTANCES

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ANSWER TO MOTIONS TO DISMISS No. 75-1691 BASED UPON MOOTNESS AND TO AFFIRM No. 75-1698 BASED UPON INTERVENING CIRCUMSTANCES.

1. Appellants do not oppose appellees' motion to dismiss No. 75-1691 since they are in agreement that the effect of the 1976 Hospital Agreement between appellants in No. 75-1691 ("DVHC hospitals") and appellee Blue Cross of Greater Philadelphia ("Blue Cross") is substantially to moot the issues presented by that appeal. Moreover, they agree that, in accordance with established procedure as specified in **United States v. Munsingwear, Inc.,** 340 U. S. 36, 39 (1950), it would be appropriate for this Court to dismiss the appeal in No. 75-1691 and to vacate the order below insofar as it is the subject of this appeal.

2. Appellants, however, oppose the motion to affirm No. 75-1698. They do so on the ground that No. 75-1698 is moot for precisely the same reasons as is No. 75-1691. The sole controversy presented by the appeal in No. 75-1698 was the impact of Pennsylvania Act No. 94 upon the pre-existing contract between Williamsport Hospital ("Williamsport") and the Hospital Service Association of Northeastern Pennsylvania ("Northeastern"), the relevant hospital plan corporation.[1] Although appellees were ap-

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1. The appellants in No. 75-1698 are Williamsport, solely in its own behalf, and the Hospital Association of Pennsylvania ("HAP"), a professional organization in the nature of a trade association, which lacks legal authority to represent or bind its members before the Court. Both were plaintiffs-intervenors in the proceeding before the district court.

While the Amended Complaint at Civil Action No. 75-2306 below contains class action allegations (Appendix 32-33), no order certifying class status was ever entered and the opinion and order of the district court do not contain class findings as required by Rule 23(c)(3) of the Federal Rules of Civil Procedure. See Brief for Appellees at 15. Nor does the lower court's opinion and order

(footnote continued)

parently unaware of the fact when they filed their motion to affirm No. 75-1698, the parties to the affected contract have entered a new contract subsequent to the passage of Act 94, and, accordingly, that controversy is now moot upon the same reasoning advanced with respect to No. 75-1691.

It is undisputed that Williamsport has been operating since July 1, 1967 under a contract with Northeastern which is similar in pertinent respects to the "member" contracts between the DVHC hospitals and Blue Cross, but which is automatically renewable for successive one-year terms unless notice of termination is given ninety days before its July 1 anniversary date. (A copy of that contract, as amended by a Memorandum of Understanding, is attached hereto as Attachment A). The contract had been renewed on July 1, 1975. Thus, when Act No. 94 was passed on August 2, 1975, its effect was to lock Williamsport into a pre-existing contract for up to thirteen months beyond the agreed upon contract term. It was this requirement that it provide service under a retroactively extended contract which Williamsport challenged as unconstitutional. Under appellees' own reasoning, that challenge became moot when, on April 2, 1976, with full awareness of Act No. 94, Williamsport permitted the contract to go into another renewal term.

While Williamsport is still subject to the prospective hearing and negotiation provisions of Act No. 94 (as are the DVHC hospitals), the impact of the Act upon a contract entered into after its passage presents quite a different question from that which was originally raised by Williamsport in its Jurisdictional Statement and upon which this Court noted jurisdiction. Accordingly, there is

1. (Cont'd.)
reveal any intention to treat the matter as one involving or applicable to a class. *Cf.* **Richardson v. Ramirez,** 418 U. S. 24, 36-40 (1974).

no longer any case or controversy before the Court upon which to exercise its jurisdiction.[2]

3. Asssuming that both appeals are dismissed as moot, and the entire order below vacated, the continued harm to appellants in No. 75-1961 would not be so great as to justify opposing the Motion to Dismiss and asking the Court to exercise continuing jurisdiction. However, this is not to say that the DVHC hospitals and other members of the class they sought unsuccessfully to represent before the District Court would not be seriously prejudiced were any part of the opinion and order below to be permitted by this Court to remain in effect. *See, e.g.,* **Super Tire Engineering Co. v. McCorkle,** 416 U. S. 115 (1974); **Carroll v. President and Commissioners of Princess Anne,** 393 U. S. 175 (1968). Accordingly, if the Court declines to dismiss the appeal at No. 75-1698 upon grounds of mootness, it would be inappropriate for it to decide that case on the merits without also hearing argument in and deciding the companion appeal at No. 75-1691 out of which it originally arose.[3] There is no legal basis for treating the appeals differently, since whatever continued impact results from the effect of Act 94 upon future contract negotiations applies equally to the appellants in both appeals. Indeed,

2. At the time of the renewal, Williamsport did not consider the possible impact of that event upon the continuing viability of this appeal since, as will be discussed *infra* at paragraph 3, the order below is not without some continued impact. However, upon consideration of the arguments raised by appellees in their Motion to Dismiss No. 75-1691 and the relevant case law, all appellants now concur in the view that the disposition of the appeal at No. 75-1698 must follow that of the companion appeal.

3. Not only have Williamsport and HAP argued the appeal at No. 75-1698 as an aspect of and in the context of the appeal at No. 75-1691, but the entire record before the Court relates to the controversy in No. 75-1691 between the DVHC hospitals and Blue Cross.

to the degree that the appeals can be distinguished, the stronger argument against mootness exists in No. 75-1691 in that there remains a possible conflict between Act 94 and the 1976 Hospital Agreement as a result of which the Act may continue retroactively to deny certain DVHC hospitals rights which they had had before enactment of Act 94. Moreover, the DVHC hospitals had sought, if unsuccessfully, to represent the class of hospitals which includes many hospitals whose preexisting contracts were extended to their detriment by Act 94 and which could, had the class been certified, maintain this appeal.[4]

RELIEF REQUESTED.

For the reasons set forth in the above Answer to appellees' motions to dismiss No. 75-1691 and to affirm No. 75-1698 respectively, it is respectfully requested that appellees' Motion To Dismiss No. 75-1691 Based Upon Mootness be granted, that appellees' Motion To Affirm No. 75-1698 Based Upon Intervening Circumstances be denied, that the appeals in both cases be dismissed as moot, and that the order of the district court from which these consolidated appeals are taken be vacated and this cause remanded to the district court with a direction to dismiss. However, in the event that the Court should find it retains jurisdiction over any part of either appeal, it is respectfully

4. On the other hand, to the extent that the status of HAP or DVHC as appellants is relied upon for the proposition that they could maintain one or both of these appeals because there are hospitals represented by these organizations which still have contracts with hospital plan corporations entered prior to passage of Act 94, the Court should be aware of the serious question as to standing thereby presented. *See e.g.*, **Village of Arlington Heights v. Metropolitan Housing Development Corp.**, — U. S. — 45 U. S. L. W. 4073 (January 11, 1977).

submitted that it should deny both motions made by appellees and hear argument as originally scheduled upon both Nos. 75-1691 and 75-1698.

Respectfully submitted,

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Attorneys for Appellants.

ATTACHMENT A

AGREEMENT
BETWEEN
HOSPITAL SERVICE ASSOCIATION OF
NORTHEASTERN PENNSYLVANIA, INC.
AND
THE WILLIAMSPORT HOSPITAL

THIS AGREEMENT made this 11th day of July, 1967, by and between the HOSPITAL SERVICE ASSOCIATION OF NORTHEASTERN PENNSYLVANIA, INC., a non-profit corporation hereinafter called "Blue Cross" and the WILLIAMSPORT HOSPITAL, hereinafter called "Member Hospital",

WITNESSETH: In consideration of the agreements hereinafter contained, the parties agree as follows:

I

THE MEMBER HOSPITAL AGREES:

A. To receive for Hospitalization, to the extent that accommodations are available, all Subscribers to Blue Cross who may apply for and be eligible without any charge to the subscriber for covered services specified in the member's Subscription Agreements issued, or to be issued, copies of which shall be furnished the Member Hospital.

B. To report to Blue Cross, upon admission of any Subscriber, notice of such admission on forms supplied by Blue Cross.

C. To furnish to Blue Cross, within 15 days of date of discharge and/or receipt of confirmation of benefits, statement of charges during hospital stay for services and credits extended to Sub-

scriber by Member Hospital on forms mutually agreed upon or furnished by Blue Cross.

D. To furnish copy of said statement to Subscribers of Blue Cross upon discharge or by mail to Subscriber's residence within 15 days after Blue Cross payment is received.

E. To extend Blue Cross benefits outlined in Subscription Agreements to any patient it may admit as an eligible Subscriber of an approved Blue Cross Plan.

F. To make available to Blue Cross all information and records, or copies of records, relating to care of Subscribers as are now normally furnished.

II

Blue Cross Agrees:

A. To reimburse the Member Hospital for patient services provided Subscribers, the lesser of 98% of patient charges, or a per diem rate based upon the cost of furnishing services to non-Medicare patients as hereinafter provided.

B. To furnish Member Hospitals with comparative statistical, financial, utilization, and other relevant data from time to time. Blue Cross further agrees that it will consult with and advise Member Hospitals on a continuing basis to assist them in cost reduction programs, in improving their capabilities, and in adapting various management techniques through its Cooperative Management Systems and Report Programs.

C. To present to the Hospital Advisory Committee any changes in membership Subscription Agreements prior to the adoption of said changes.

III

The Parties Hereto Agree That:

It is the intent of this Agreement that all necessary and proper net operating expenses incurred by a Member Hospital in providing patient care, including both direct and indirect costs, be recognized.

A. *Allowable Depreciation:*

1. An appropriate factor for depreciation on buildings and equipment is an allowable cost if the depreciation is:

   a. Identifiable and recorded on a hospital's accounting records.

   b. Based on the historical cost of the asset, or an appraisal of historical cost made by recognized appraisers, when records of purchased assets are not available, or at fair market value at time of donation, and

   c. Prorated over the estimated useful life of the asset using the straight-line method, or a mutually agreed upon percentage factor in lieu of straight-line depreciation, if the Member Hospital's records do not reflect the straight-line method.

2. The Chart of Accounts published by the American Hospital Association shall be used as the guide for determining the useful life of assets.

3. Gains and losses realized from the disposal of depreciable assets will be included in allowable costs. The extent to which gains and

losses are includable will be on a proration basis recognizing the amount of depreciation charged from the effective date of this Agreement to the total depreciation charged to the date of disposal.

4. Equipment items with a dollar value in excess of $100 and a life expectancy of over one year should be capitalized.

B. Items Not Includable as Operating Expense:

The Member Hospital shall not include as operating expense:

1. The expenses incurred by the Member Hospital in connection with any building program, including but not limited to, fund raising expenses, expenses of the hospital's public relations department, and, up to the time the building is completed, and in use, interest on construction loans.

2. Cost incurred for research and recognized educational activities, over and above usual patient care. Where research and recognized educational activities are conducted with and as part of patient care, the cost of usual patient care is allowable only to the extent that such costs are not met by funds provided for this purpose from other sources.

3. Expenses relating to the use and operation of vending machines and snack bars.

4. Expenses incurred in connection with investments and properties held for investment.

C. Deductible Items:

1. Revenues derived from areas or services not related to patient care, but including patient revenues for convenience items, will be deducted from related costs.

2. The cost of producing these revenues may be deducted in lieu of the revenue, provided the cost figures are acceptable to Blue Cross and the Member Hospital. Where there is no related cost, there will be no deduction.

   These income items include, but are not limited to:

   Abstract Fees, Telephone, Radio, Television, Sale of Drugs, Sale of Medical and Surgical Supplies, Photography, Identification Bands, Hospitality Shops, Employee Cafeteria Revenue, Vending Machines, Rental of Space, Sale of Scraps, Student Tuition, Rental of Quarters, Personal Laundry, Guest Trays, etc.

D. Computation of Reimbursable Costs:

1. The Member Hospital's operating expense calculated pursuant to the foregoing provisions shall constitute its net operating expense for patient care. From this amount shall be deducted the finally determined cost for Medicare patients exclusive of the Medicare allowance in lieu of specific recognition of other costs, and the remainder shall be accepted as a net operating expense for non-Medicare patients. The net operating expense for non-Medicare patients shall be divided into out-patient, nursery, and in-

patient care by accepted accounting practices.

2. The net operating expense for non-Medicare in-patients shall be divided by the number of non-Medicare days of care the hospital rendered to in-patients during the reporting period and the quotient shall be accepted as the Member Hospital's cost per non-Medicare in-patient day. In computing the number of days of hospital services furnished by the hospital to a Subscriber, the day of admission shall be counted, but not the day of discharge. If the patient fail to leave the hospital before the established discharge hour, he shall be responsible to the hospital for all charges incurred after that time.

3. For reimbursement of full benefit nursery cases, an average per diem rate based on the net allowable cost of care for the newborn and premature nursery (when such latter cost is included in this category) will be paid in addition to the cost of the mother's stay.

4. For out-patient cases, Blue Cross shall pay an average per patient rate based on the net allowable cost of care rendered in the out-patient department.

5. An allowance of 4% of the non-Medicare cost as determined above (with the exception of interest expense) shall be included as an allowance in lieu of specific recognition of other costs in providing and improving patient services providing that the Member Hospital will fund this specific allowance included in this Agreement.

6. In determining the reimbursement due the hospital, the charges payable by the Subscriber for patient care shall be credited to the Blue Cross obligation to the Member Hospital under this Agreement.

7. An allowance of 4% of essential charges not covered by the Subscriber's Agreement for the approved benefit period shall be included in the Member Hospital's reimbursement as a factor for bad debts.

8. The rate of reimbursement, as calculated above for the preceding 6 months, shall be used as the basis of determining the initial payment to be paid the Member Hospital during the next 6-months period. This initial rate of payment may be reviewed by the Member Hospital and Blue Cross prior to use, and modified to approximate the Member Hospital's anticipated costs. It shall also be subject to review and modification during the period at any time the hospital can justify an increase in its costs. Such initial payment shall be made on a weekly basis by Blue Cross.

9. In addition to the Initial payment, there shall be made, not less than semi-annually, an adjustment of payments on the basis described. At the end of each fiscal year, and after the Medicare costs for the entire year have been determined, the adjustments made semi-annually are subject to further review and adjustment.

10. Member Hospitals' report of statistics and costs shall be submitted to Blue Cross each six

months of the calendar year within 90 days after the end of the period. To assure uniformity in the determination of costs according to the reimbursement cost formula, such reports and Hospital books shall be subject to audit by Blue Cross.

11. In the event the reimbursable costs for any six-months reimbursement period are ascertained to be greater than the payments made for the period, Blue Cross will pay the amount due within 30 days of receipt of the cost report. Final settlement will be made upon completion of the audit.

12. In the event the reimbursable costs for any six-months reimbursement period are ascertained to have been less than the payments made for that period, the overpayment will be refunded by the Member Hospital within 30 days on a mutually agreed upon basis.

13. Payment for obstetrical cases or conditions relating to pregnancy under the Regular Semi-Private Agreement shall continue to be paid on the basis of the allowable indemnity.

14. Cases which involve Medicare patients holding Complementary Coverage shall continue to be paid on an indemnity basis, except for those in-patient days in excess of 90 days, which shall be reimbursed on the basis of the per diem cost determined herein.

15. The value of voluntary services provided by Sisters or other members of religious orders is allowable as an operating expense in an amount not to exceed those paid others for

similar work. Such amounts must be identifiable and recorded in the records of the Member Hospital.

E. Hospital Advisory Committee:

There shall be a Hospital Advisory Committee to Blue Cross of Northeastern Pennsylvania, which shall function in an advisory capacity to Member Hospitals and Blue Cross. The Committee shall be broadly representative of all Member Hospitals. The Committee shall meet quarterly, or more often if needed, and shall review with Blue Cross the implementation of, and any suggested changes in this Agreement.

This Agreement shall be for a period of one year from the effective date hereof, and shall be automatically renewed from year to year thereafter, except that after the initial term either party hereto may terminate this Agreement by giving to the other not less than ninety (90) days written notice; provided, however, the obligation of the Member Hospital to render hospital care under the terms of this Agreement shall not cease to all Subscribers of Blue Cross who were members prior to such termination until the end of their subscription year. And provided, further, that Blue Cross shall honor such subscribers of record by paying Member Hospitals at a rate calculated under the terms of this Agreement in effect at the time of termination any amount due under terms of Membership.

This Agreement supercedes and takes the place of all contracts between the parties hereto in existence prior to the execution hereof concerning the subject matter herein involved.

The effective date of this Agreement is July 1, 1967.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed by their authorized officers and their Corporate Seals to be hereunto affixed, the day and year first above written.

HOSPITAL SERVICE ASSOCIATION OF
NORTHEASTERN PENNSYLVANIA, INC.

Attest:

R. W. HARRIS
Assistant Secretary

By: RALPH S. SMITH
President

THE WILLIAMSPORT HOSPITAL

Attest:

C. R. WAXMAN, JR.
Secretary

By: HARRY R. GIBSON
President

MEMORANDUM OF UNDERSTANDING
BETWEEN
BLUE CROSS OF NORTHEASTERN PENNSYLVANIA
AND
THE WILLIAMSPORT HOSPITAL
(HOSPITAL)

MADE THIS 28TH DAY OF JUNE, 1972

IT IS AGREED THAT:

A. Member Hospitals will obtain the approval of planning agencies serving their area for any capital expenditure when the additional cost of such capital expenditure exceeds $100,000. If the project is not approved by the planning agency, Blue Cross reserves the right to refuse payment for this project. Member Hospitals agree to continue and expand efforts toward the combining of facilities and services in order to avoid costly duplication resulting in needless expense to the communities they serve.

B. Member Hospitals agree to provide all patients accommodations which are in substantial compliance with the standards of safety and quality of the Joint Commission on Accreditation of Hospitals and/or the American Osteopathic Association. Hospitals not now having properly constituted and operating Safety Committees agree to the prompt formation of such committees. Where existent, hospitals should evaluate all facets for current safety committee operation to assure appropriate representation, effective written policies and procedures, regular meetings and effective evaluation of performance.

C. Effective management and more meaningful control of costs is heavily dependent upon the rigorous discipline of the preparation of the detailed budget. The preparation of the annual budget is the responsibility of the administration acting within policy established by the governing body. Such budget should be approved annually by the governing body of the hospital. A financial and statistical summary of budget data will be submitted to Blue Cross annually for the purpose of providing information for setting Subscriber rates.

D. Member Hospitals will conduct continuing educational programs. Such programs will involve governing boards, medical staff and administration and shall include such items as pre-admission testing, timely scheduling, admission and discharge procedures, and adopt them where appropriate.

E. Member Hospitals and Blue Cross each agree, because an informed public is essential, to regularly publish (at least annually) such statistical, financial and other appropriate operating data as will provide the publics they serve with a means of evaluating and accounting for their stewardship.

F. Consistent with fair and equitable standards of selection and appraisal as developed by Governing Bodies, Administration and Medical Staffs, Hospitals agree to follow policies which will not deny to qualified physicians, who agree to meet the rules and regulations of the hospital, staff privileges.

G. Member Hospitals will avail themselves of the assistance provided for in the now-existing contract; wherein Blue Cross offers, "To furnish Member Hospitals with comparative statistical, financial, utilization, employee-to-patient ratio, and other relevant data from time to time. Blue Cross further agrees that it will consult with and advise Member Hospitals on a continuing basis to assist them in cost reduction programs, in improving their capabilities, and adapting various management techniques through its Cooperative Management Systems and Report Programs." Member Hospitals will act upon any reasonable recommendations.

H. An essential committee function of the medical staff is Utilization Review. Its goal is, through continuing educational effort, to assure the provision of the highest possible quality of care in the most effective and efficient manner. To achieve optimum performance, such committees must have available comprehensive data on individual hospital performance and comparative data from others. Hospitals agree that where such data is not now available to them, such data shall be obtained and used. Cost of such services are reimbursable by Blue Cross.

I. Depreciation based on "straight-line" historical costs will be allowed only if such allowance is (a) fully funded, or (b) used to pay principal of capital debt.

J. Contracts with and remuneration of hospital-based physicians or group practices must be reviewed and approved by Hospital governing bodies.

K. Economies can be achieved through appropriate purchasing policies for hospital supplies and equipment. Hospitals agree that, in purchasing, all reasonable steps will be taken to effect economies through affiliation with Group Purchasing organizations or other equally effective means.

L. Consistent with ethical standards of quality and suitability, hospitals agree to take prompt steps to implement or further their current practice of obtaining pharmaceuticals under a hospital and medical staff-approved generic drug ordering and prescribing system. Such systems and methodology as are used (or may be adopted) must not abridge the right of the attending physicians to order a drug of their choice, but they should clearly specify the right of the hospital to purchase and fill prescriptions generically in the absence of specific instructions to the contrary from the physician.

M. Member Hospitals, in order that, as much as possible, costly duplication be avoided, agree to accept test results and examinations performed outside the hospital when, as stated in the standards of the Joint Commission on Accreditation of Hospitals, such laboratories "have been given prior approval by the pathologist and medical staff" and when such tests are done "within a time reasonably proximate to the hospital admission to be acceptable."

N. The terms of this Memorandum of Understanding shall be coextensive with the now existing contract between the parties hereto, dated the 11th day of July, 1967 and any extensions thereof.

IN WITNESS WHEREOF, the parties hereto have caused this Memorandum of Understanding to be executed the month, day and year first above written.

BLUE CROSS OF NORTHEASTERN PENNSYLVANIA

By: RALPH S. SMITH

Title: *President*

THE WILLIAMSPORT HOSPITAL (Hospital)

By: C. R. WAXMAN, JR.

Title: *President*

Final Revision—per Member Hospital Administrators' Meeting of Friday, August 27, 1971.